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IN THE

Supreme Court of the United States

OCTOBER TERM—1945

No. 1002

ELIAS BRAILAS,

Petitioner,

against

SHEPARD STEAMSHIP COMPANY,

Respondent.

ANSWER AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

Elias Brailas, Chief Engineer of the S.S. "Lot Whitcomb" brought this action against Shepard Steamship Corporation, agent of the United States of America, to whom the vessel had been allocated under a service agreement pursuant to which Shepard Steamship Company was to manage and conduct the business of the vessel as agent of the United States and subject to instructions and regulations.

The complaint alleges that plaintiff was employed by defendant; that he sustained personal injuries as result of an altercation with a subordinate, Nick Dolianitis, the first assistant engineer; and seeks recovery under the

Merchant Marine Act, approved June 5, 1920, Section 33, 46 U. S. C. A. 688.

The principal allegation of the complaint is that defendant "failed to take any means or precautions to exercise adequate and proper restraint over one, Nick Dolianitis, the first assistant engineer, who was known to be a person of vicious propensities, and known to be an individual whose presence aboard the vessel unduly endangered the life and safety of the crew, including the plaintiff" and that Nick Dolianitis used excessive force and violence in ordering and directing plaintiff in his work.

The issue as to whether plaintiff was employed by defendant or the United States was determined, by the Trial Court, in favor of plaintiff and the Circuit Court of Appeals did not reach the issue in affirming the judgment.

The jury returned a verdict in favor of the defendant.

The judgment was unanimously affirmed by the Circuit Court of Appeals for the Second Circuit, whose opinion is reported in 152 F. (2d) 849.

Assignment of Errors

The errors assigned by plaintiff are not in accord with the record.

Neither the Circuit Court of Appeals for the Second Circuit, nor the District Court refused to extend the benefits of the Jones Act to a ship's officer and did not curtail the provisions of the Jones Act.

The Facts

Brailas, having been hired as Chief Engineer, recommended Dolianides for employment as Second Assistant Engineer and for advancement to First Assistant Engineer. After the vessel sailed, and while at sea, animosity arose between Brailas and Dolianides. Dolianides is claimed to have said to a cook "Some day I'm going to fix him." The cook allegedly reported to the Chief Mate, but testified that he thought Dolianides was a "nice fellow."

The testimony concerning Brailas indicates that he was a strict disciplinarian and was not on friendly terms with the officers and members of the crew.

Dolianides had given no trouble and was generally liked by those aboard the vessel.

On January 21, 1944, as the ship was maneuvering for anchorage at Suez, Brailas entered the engine room while Dolianides was on watch and at his post at the throttle. Brailas found an oiler doing calisthenics and reprimanded him. Some discussion followed between Brailas and Dolianides in the course of which a signal was received, via telegraph, for full speed ahead. Brailas testified that Dolianides was slow in complying with the order and that he pulled Dolianides away and seized control of the throttle. Dolianides testified that as he was in the act of responding to the signal Brailas attacked him and kicked him in the groin several times; that he picked up a scraper to protect himself and did not know that he had stabbed Brailas until he was told.

The Trial Court held:

> "I think there is no issue in the case to go to the jury on whether or not Nick was engaged in the business of the ship or within the scope of his em-

> ployment, or transacting and prosecuting his master's duties in committing the assault."

The issue was submitted to the jury upon instructions to find for the plaintiff if they were satisfied that Dolianides had threatened harm to Brailas, and the ship had notice of the threat and failed to take proper measures to prevent an assault.

The lower Court held:

> 1. A master is not liable for the negligent acts of his servant unless they are performed in the course of, or in furtherance of the master's business and plaintiff's requests to charge based upon a contrary theory were properly refused.
>
> 2. The issue of whether the words uttered by Dolianides, prior to the stabbing, constituted a threat of which defendant should have taken notice was submitted to the jury under proper instructions.

Question of Law

No clear question of law is presented by the petition.

Question "1" would seem to be clearly a question of fact and not of law.

Questions "2" and "3" are repetitious and so incomplete as to leave much to speculation.

Questions "2" and "3" combined into one, would state the question which the plaintiff presents as follows:

> Is a chief engineer, stabbed by a first assistant engineer, his subordinate, while endeavoring to take charge of the ship's throttle in response to a danger signal, entitled to recover damages under the Jones Act, 46 U. S. C. A. 688?

Even when so stated the question is incomplete as it does not show whether or not the act could be imputable to the ship.

POINT I

The Court below committed no error as plaintiff failed to show negligence chargeable to the defendant.

The contention of the plaintiff seems to be that the mere fact of the stabbing creates actionable negligence.

Plaintiff relies on:

Jamison v. *Encarnacion,* 281 U. S. 635.

In that case this Court recognized the principle that:

> "* * * liability arises when one suffers injury as the result of any breach of duty owed him by another chargeable with knowledge of the probable results of his conduct."

and holds that an assault by a foreman upon his subordinate, if in furtherance of the work of the employer's business, constitutes actionable negligence.

The cases of *Alpha S. S. Corp.* v. *Cain,* 281 U. S. 642, and *Nelson* v. *American-West African Line,* 86 F. 2d 730, rest upon the same principle.

In *Pittsburgh S. S. Co.* v. *Palo,* 64 F. 2d 198, the action was under the Jones Act. The Court said at page 200:

> "But conceding that the risk of injury was not assumed in the present case, all the authorities seemingly proceed upon the hypothesis that, in order to maintain an action under this section, negligence (as defined by the common law) must be shown. Cf. Panama R. R. v. Vasquez, 271 U. S. 557, 559, 46 S. Ct. 596, 70 L. Ed. 1085; Baltimore S. S. Co., 600, 71 L. Ed. 50 S. Ct. 207, 74 L. Ed. 686. The shipowner is not an insurer of the safety of his seamen, and the burden of establishing negligence rests upon plaintiff. Burton v. Greig, 271 F. 271 (CCA 5)."

In this case Dolianides had no control or authority over Brailas.

The assault, if wanton and willful as asserted by plaintiff, would constitute a criminal offense punishable by two year's imprisonment (46 U. S. C. A. 701, Subdivision Sixth).

An assistant engineer cannot be said to act in furtherance of his master's business when he commits a crime in assaulting a chief engineer as the latter attempts to take control at a time of emergency.

> *Atlantic Coast Line R. R. Co.* v. *Southwell,* 275 U. S. 64.

The fact that the injury is done during continuance of the employment is not enough.

In *Davis* v. *Green,* 260 U. S. 349, the Court said at pages 351-352:

> "The ground on which the Railroad Company was held was that it had negligently employed a dangerous man with notice of his characteristics, and that the killing occurred in the course of the engineer's employment. But neither allegations nor proof present the killing as done to further the master's business, or as anything but a wanton and wilful act done to satisfy the temper or spite of the engineer. Whatever may be the law of Mississippi, a railroad company is not liable for such an act under the statutes of the United States. The only sense in which the engineer was acting in the course of his employment was that he had received an order from Green which it was his duty to obey—in other words that he did a wilful act wholly outside the scope of his employment while his employment was going on. We see nothing in the evidence that would justify a verdict unless the doctrine of respondeat superior applies."

In *Lykes Bros. S. S. Co.* v. *Grubaugh,* 128 F. (2d) 387 (5 Cir. 1942), a chief engineer and an assistant engineer assaulted the chief steward. The Court said, at page 391:

"The law governing the responsibility of the master for an injury from a beating administered by one employee to another, as well stated in Medlin Milling Co. v. Boutwell, 104 Tex. 87, 133 S. W. 1042, 34 L. R. A., N. S., 109, and Davis v. Green, 260 U. S. 349, 43 S. Ct. 123, 67 L. Ed. 299, is that under the doctrine of respondeat superior there is no liability for a wrongful assault committed by one employee on a another unless the assault is committed, whether wisely or unwisely, in furtherance of or in an attempt to further the master's business or in other words in connection with some act which an assaulter is authorized to do for the master. In any case where the act is merely a wanton and wilful act done to satisfy the temper or spite of the employee, the master is not liable. In Jamison v. Encarnacion, 281 U. S. 635, 50 S. Ct. 440, 74 L. Ed. 1082, and Alpha Steamship Corp. v. Cain, 281 U. S. 642, 50 S. Ct. 443, 74 L. Ed. 1086, applying to assaults on shipboard, the rule of the Green case, the Supreme Court declares, that the employer may be liable under the Jones Act only when the assault is committed by one having authority over the person assaulted and then only when it is committed in the course of the conduct of the master's business. In each of those cases the assault was by a superior officer upon a subordinate employee whom the assailant had the power and the authority to direct, control and discipline. No case has held a steamship company liable for an assault committed by a subordinate employee upon his superior or by the head of one department upon the head or an employee of another department over whom the assailant has no authority or direction or control. * * *"

See also:

Bonsalem v. *Byron S. S. Co.*, 50 F. 2d 114.

It being undisputed that Dolianides was hired at the instance of Brailas, plaintiff ascribed no negligence in the employment of Dolianides.

The only theory on which plaintiff could possibly recover is that the defendant was negligent in keeping Dolianides in his position with knowledge that he was likely to cause trouble. This issue was tried and determined by the jury in favor of the defendant and against the plaintiff.

The cases relied upon by the plaintiff have no application in this case and are readily distinguishable.

In *Poole* v. *Kelly,* 162 Va. 279, an automobile passenger was injured when the driver lost control, driving at about 80 miles an hour, on a sand gravel and tar road. The question was whether the accident was due to a mechanical defect, unknown to the driver, or to his negligence. The case bears no similarity to the case at bar.

In *Bolin* v. *Chicago, St. P. & M. Railway Co.,* 108 Wis. 333, the conductor of a train struck a trespasser and forced him to leave the train while it was in motion.

In *Peoria Bridge Association* v. *Loomis,* 20 Ill. 235, the Court said, at page 251:

> "* * * To constitute willful negligence, the act done, or omitted to be done, must be intended. * * *"

In *C. R. I. & P. Railway Co.* v. *Hambler,* 215 Ill. 525, a Pullman porter sued the railroad for injuries sustained when the engine exploded. The Court said at page 533:

> "* * * in negligence, merely, there is no intention to do a wrongful act or omit the performance of a duty * * *"

and at page 541:

> "* * * The only question in any case is whether there is actionable negligence, and if there is, the authorities establish the proposition that the rights of the parties are not affected by any question of the degree of such negligence."

In *Mercer* v. *Corbin*, 117 Ind. 450, plaintiff was struck by defendant who was driving a bicycle on a sidewalk, an act forbidden by law. The action was for assault, and the Court said at page 451:

> "* * * The complaint, however, does not proceed upon the theory that the wrong was a mere negligent one, and we cannot sustain the recovery upon any other cause of action than that set forth in the complaint. * * *"

Under the facts in this case the defendant cannot be charged with a wanton or willful act constituting gross negligence as it clearly appears that the intent upon which such degree of negligence must be based was not and could not be present.

POINT II

A disputed question decided by a jury is not a subject for review by the United States Supreme Court.

The law is well settled as stated in the case of *Campana Corp.* v. *Harrison*, 114 F. (2d) 400, on page 405:

> "The reviewing Court does not review the evidence as an original fact finding tribunal; it does not attempt to settle conflicts in evidence or to determine questions of credibility."

McDonald v. *Pless*, 238 U. S. 264;
Hyde v. *U. S.*, 225 U. S. 347;
Mattox v. *U. S.*, 146 U. S. 140;
8 *Wigmore Evidence* (3rd Ed. 1940) 668-677, 282 ff.;
Sunderland, Verdicts General and Special, 29 Yale L. J. 253 (1919).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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